Supreme Court, U.S.
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No. 99-592

In The

Supreme Court of the United States

GARY COLLINS, *et al.*,

Petitioners,

v.

SPOKANE VALLEY FIRE PROTECTION DISTRICT NO. 1, a Public Employer and Political Subdivision of the State of Washington,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

RESPONSE TO PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

In light of the Court's decision to grant certiorari in *Christensen v. Harris County*, No. 98-1167, 1999 U.S. LEXIS 6902 (U.S. Oct. 12, 1999) ("*Christensen*"), should the Court grant certiorari to decide whether the Ninth Circuit Court of Appeals erred in holding that the Fair Labor Standards Act of 1938, 29 U.S.C. § 201 *et seq.* (the "FLSA"), does not prohibit a public employer from compelling its employees to use their accrued compensatory time, where the employer and the employees' union have negotiated and entered into a collective bargaining agreement and the employer acted in accordance with that agreement when compelling its employees to use compensatory time?

PARTIES

Plaintiffs-Appellants below and Petitioners in the Court (the "Firefighters"):

Gary Collins
Dennis Doyle
Gary Ghirarduzzi
Bruce Hamner
Don Matthews
Jeff McLaughlin
Wayne McLaughlin
Jeff Miner
Dave Phay

Defendant-Appellee below and Respondent in the Court (the "Fire District"):

Spokane County Fire District No. 1, a Public Employer and Political Subdivision of the State of Washington

Although the Firefighters named David Lobdell, an Assistant Fire Chief for the Fire District, as a defendant in this lawsuit, the Fire District moved for partial summary judgment shortly after the Firefighters filed this case in the District Court, requesting dismissal of Lobdell from the lawsuit in his individual capacity. Rather than opposing the motion, the Firefighters agreed that Lobdell should not be a party in the action and stipulated that he be dismissed from the lawsuit. In September 1997, the District Court ordered Lobdell's dismissal.

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INTRODUCTION

The Fire District seeks to correct and supplement the record presented to the Court by the Firefighters so that it accurately reflects the decisions below and factual background of this case. The Fire District does not oppose the Petition for Writ of Certiorari. Rather, for the reasons set forth in its Cross-Petition for a Writ of Certiorari ("Cross-Petition for Writ of Certiorari"), filed herewith, the Fire District respectfully requests that the Court grant the Petition for Writ of Certiorari and the Cross-Petition for Writ of Certiorari and consider this case with *Christensen*.

STATEMENT OF THE CASE[1]

The Firefighters are employed by the Fire District. They are represented by a union, International Association of Fire Fighters Local 876 (the "Union"). ER 1, ¶ 1.1. The terms and conditions of the Firefighters' employment with the Fire District are governed by a collective bargaining agreement between the Fire District and the Union (the "collective bargaining agreement"). SER 164, 167-97.

[1] The Statement of the Case is based on the Ninth Circuit opinion, the District Court opinion, and the factual record below. The Ninth Circuit and District Court opinions have been reproduced and attached as Appendix A and Appendix B, respectively, to the Petition for Writ of Certiorari. Citations to the factual record below are abbreviated as "CR" for Clerk's Record, "ER" for Excerpts of Record, and "SER" for Supplemental Excerpts of Record.

In 1990, the Fire District and the Union negotiated a contract provision for unit personnel to accrue what is known as "compensatory time" (or "comp time"). Under this provision, the Firefighters can perform various tasks and, regardless of whether hours spent on those tasks are overtime hours, receive a credit for time off equal to one and one-half times the number of hours worked. This bank of compensatory time can then be used as provided in the collective bargaining agreement. SER 164, 185. Such arrangements are permissible under Section 7 of the FLSA, where the employer and employees (or their representative) expressly agree to them, as in the present case. The compensatory time provision has been included in the three contracts since 1990. SER 164.

When negotiating the compensatory time provision, the Fire District had a number of jobs that it needed performed that were not directly connected to the employees' regular duties. For example, the Fire District needed someone to program and maintain its computer system. The Fire District could have contracted out for this work, but several employees wanted to perform the work and the Fire District was willing to let them perform it as long as it could be done economically by paying the employees in the form of compensatory time off. The parties negotiated the compensatory time provision with this intent and agreed to a cap of 144 hours on accrual of compensatory time.

Because of the intent of the parties when negotiating the compensatory time provision, it was understood that employees would not accrue compensatory time up to the 144-hour cap, because doing so would put the Fire District in the position of being forced to have the contemplated work go undone or pay time and one-half for it,

neither of which was the intent of the parties. The parties' undisputed intent was never that employees could bank their compensatory time up to the cap and receive cash payments on a regular basis at one and one-half times their regular rate of pay. ER 35, ¶ 2.

Contrary to the agreement between the parties, the Firefighters accrued compensatory time and did not use it. SER 164. As the Firefighters' hours approached or exceeded the 144-hour cap, the Fire District was faced with a Hobson's choice: either allow the work to go undone or pay time and one-half for the Firefighters' services. *Id.* Therefore, the Fire District, consistent with the intent and meaning of the parties' agreement, directed each of the Firefighters to schedule one or two shifts of compensatory time off sometime in the following one-month period. SER 165.[2] The Firefighters then filed

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[2] The Firefighters' statement that, "[b]ecause the Fire District desired to schedule additional overtime, but did not want to pay cash for any hours above the 144-hour cap, the Fire District ordered the firefighters to use some of their accrued comp time," is misleading. *See* Petition for Writ of Certiorari at 4. First, the hours worked by the Firefighters on special projects were not always overtime hours. *See* SER 164, 185. Nonetheless, the Fire District compensated the Firefighters for those hours with compensatory time off, at a rate of one and one-half times the number of hours worked, pursuant to the collective bargaining agreement. Second, the Fire District's order that the Firefighters schedule one or two shifts of compensatory time off in a one-month period was consistent with the parties' agreement and the intent behind that agreement. *See* ER 35, ¶ 2. Only when the Firefighters acted contrary to that agreement and the parties' intent did the Fire District order the Firefighters to schedule one or two shifts of compensatory time off in a one-month period.

the present action against the Fire District in June 1997 in the United States District Court for the Eastern District of Washington at Spokane, contending that the Fire District's directive violated the FLSA. ER 1. The District Court had jurisdiction under 28 U.S.C. § 1331 and 29 U.S.C. § 216(b).

In March 1998, the parties concurrently filed motions for summary judgment. *See* CR 28, 32. While the Firefighters argued that the Fire District violated the FLSA as a matter of law, regardless of the agreement between the parties, the Fire District argued that the Firefighters' complaint should be dismissed because it required interpretation of the terms of the collective bargaining agreement, and the Firefighters failed to exhaust their contractual remedies. CR 29, 33, 39, 40, 44; SER 215-72.

In June 1998, the District Court issued an Order, denying the Firefighters' motion for summary judgment and granting the Fire District's motion on the ground that the FLSA does not prohibit the agreement in this case, and, accordingly, the Fire District's directive made in accordance with that agreement was not unlawful. ER 55. The Firefighters appealed the District Court's Order pursuant to 28 U.S.C. § 1291. On August 24, 1999, the Ninth Circuit affirmed. *See* Petition for Writ of Certiorari, App. A.

RESPONSES TO PETITION FOR WRIT OF CERTIORARI

Although the Fire District agrees that review is appropriate in this case in light of the Court's decision to

grant certiorari in *Christensen* (*see* Cross-Petition for Writ of Certiorari), the Fire District disagrees with various representations made by the Firefighters in the Petition for Writ of Certiorari.

First, the Firefighters state that "[t]he Ninth Circuit did not reach the Fire District's argument that the [collective bargaining agreement] authorized the Fire District to compel use of comp time" and that the Ninth Circuit "noted some evidentiary issues related to the intent of the [collective bargaining agreement's] comp time provisions." *See* Petition for Writ of Certiorari at 5-6 n.3. While it is true that the Ninth Circuit did not rely on the parties' negotiated agreement concerning the use of compensatory time in concluding that the Fire District did not violate the FLSA, the terms of the compensatory time provision and the intent behind that provision were entirely undisputed by the Firefighters in the courts below. *See* Petition for Writ of Certiorari at App. A11 n.4.

Second, although the Ninth Circuit's decision conflicts with the Eighth Circuit's decision in *Heaton v. Moore*, 43 F.3d 1176 (8th Cir. 1994), the two cases differ factually. *See* Cross-Petition for Writ of Certiorari. Moreover, the Ninth Circuit's holding under the facts of this case does not conflict with the Department of Labor's interpretation of the FLSA. The Department of Labor has indicated that an employer may compel use of compensatory time when consistent with the parties' agreement. *See* Brief for the United States as Amicus Curiae in *Christensen* at 10-11 n.6, 11, 13. Here, the Fire District ordered the Firefighters to schedule one or two shifts of compensatory time off pursuant to the negotiated agreement between the parties. *See* Cross-Petition for Writ of Certiorari.

Finally, the Fire District disagrees with the Firefighters' contention that the Ninth Circuit's decision in this case and the Fifth Circuit's decision in *Christensen* are incorrect. *See* Petition for Writ of Certiorari at 7-8. To the contrary, although the Fire District disagrees with the Ninth Circuit's holding concerning exhaustion of the grievance procedure in the collective bargaining agreement, the Ninth Circuit and Fifth Circuit decisions are correct with respect to the compensatory time issues. Those decisions are entirely consistent with the statutory language of the FLSA, the regulations interpreting that statute, and the statute's legislative history. *See* Petition for Writ of Certiorari at App. A8-A10.

CONCLUSION

The Fire District respectfully requests that the Court grant the Petition for Writ of Certiorari and the Cross-Petition for Writ of Certiorari and consider this case with *Christensen*.

Respectfully submitted this 4th day of November, 1999.

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